Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

THRIFTWAY MARKETING CORP.,
JERRY CLAYTON, and R.J. DALLEY,

Petitioners,

vs.

DAVID DEVANEY,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of New Mexico

PETITION FOR WRIT OF CERTIORARI

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15 pp

QUESTIONS PRESENTED FOR REVIEW

QUESTION I:

WHETHER A PARTY IS DENIED THE DUE PROCESS OF LAW RIGHT TO COUNSEL WHERE THE DISCUSSIONS BETWEEN COUNSEL AND THE PARTY AND THE CIRCUMSTANCES OF COUNSEL'S PRE-SUIT INVESTIGATION ARE SUBJECT TO DISCOVERY

QUESTION II:

WHETHER A PARTY IS DENIED EQUAL PROTECTION OF LAW RIGHT OF ACCESS TO THE COURTS WHERE A PARTY REPRESENTED BY COUNSEL IS HELD TO A HIGHER STANDARD THAN A SIMILARLY SITUATED PRO SE PARTY

QUESTION III:

WHETHER THE SUPREME COURT OF THE STATE OF NEW MEXICO HAS ADOPTED A LEGAL STANDARD IN CONFLICT WITH THAT ESTABLISHED BY THE COURT

CORPORATE PARTIES

The Petitioner, Thriftway Marketing Corp., is a New Mexico corporation, and does not have any parent companies or non-wholly owned subsidiaries required to be disclosed pursuant to Rule 29.6.

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Opinion, Supreme Court of the State of New Mexico, Docket No. 23,581 (N.M. Sup. Ct., Dec. 22, 1997)

Memorandum Opinion, Court of Appeals of the State of New Mexico, No. 16,842 (N.M. Ct. App., Mar. 25, 1996)

Calendar Notice, Court of Appeals of the State of New Mexico, No. 16,842 (N.M. Ct. App., Feb. 7, 1996)

Summary Judgment Order, Eleventh Judicial District Court, State of New Mexico (Sept. 6, 1995)

STATEMENT OF JURISDICTION

Jurisdiction in this Court is proper pursuant to 28 U.S.C. Section 1257, and this Petition is timely if filed on or before March 23, 1998, which is within ninety (90) days of the issuance of the opinion of the Supreme Court of the State of New Mexico on December 22, 1997.

RELEVANT CONSTITUTIONAL PROVISION

United States Constitution – Amendment XIV

Section 1. Citizens of the United States.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an action by a former employee to obtain damages from his former employer, and two of the employer's corporate officers. The action is one for abuse of process and malicious prosecution alleging that Thriftway Marketing Corp. filed a legal action against the individual without probable or reasonable cause to do so, or for some improper, ulterior motive.

On October 4, 1991, Thriftway filed a lawsuit against Respondent in the Eleventh Judicial District Court of the State of New Mexico, the lawsuit was captioned *Thriftway Marketing Corp. v. Dave DeVaney*, No. CV 91-584-4 (the "Underlying Action"), in which it asserted two causes of action, defamation and interference with contractual relations. (S.R.P. 75-77, 89-92).[1] At the time the Underlying Action was initiated, Thriftway believed that Respondent caused to be written a newspaper article (the "Article") which appeared in the September 19, 1991, edition of the Navajo Times, a newspaper which is circulated and read throughout the Navajo Nation and certain communities surrounding the Navajo Nation, such as Farmington and Gallup, New Mexico. *Id.* The Article stated that Respondent made various negative comments about Thriftway, which were false. *Id.*

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[1] Citations to the record of the New Mexico Court of Appeals are to the Record Proper ("R.P.") and the Supplemental Record Proper ("S.R.P.") of that court.

At the time the Underlying Action was initiated, Thriftway believed it was damaged by the actions of Respondent, because the comments portrayed Thriftway in an extremely negative manner which resulted in public contempt for the company. *Id.* At that time, Thriftway also believed that it was damaged by the actions of Respondent because Thriftway's then occurring business negotiations with the Navajo Nation "went cold" and "cooled off" (descriptive terms used by Mr. Clayton and Mr. Dalley) just after government representatives of the Navajo Nation referenced the Article and stated that Thriftway had problems. *Id.*

Navajo Nation government representatives also acknowledged that Respondent had made comments about Thriftway directly to representatives of the Navajo Nation Economic Development Department. *Id.* These representatives, who were involved with the business negotiations with Thriftway, also acknowledged that they became aware of the Article during the negotiations and that the Article was discussed during the negotiations. *Id.*

Following the denial of Thriftway's motion for partial summary judgment in the Underlying Action, a discovery dispute arose over whether Thriftway would be required to divulge certain proprietary business information to Respondent. (R.P. 63; 71-72). Respondent filed a motion to compel the discovery and the trial court ruled that Thriftway would have to turn over the information. (R.P. 63). Rather than risk turning over the proprietary business information to Respondent, Thriftway filed a motion to dismiss the Underlying Action, which Respondent did not oppose. (R.P. 63; 71-72).

Then, on July 9, 1993, Respondent, filed a complaint against Thriftway which included a malicious prosecution cause of action and an abuse of process cause of action. (R.P. 1). An amended complaint was later file which added as defendants Jerry D. Clayton, the President of Thriftway, and R.J. Dalley, the Vice-President of Thriftway. (R.P. 45).

On November 8, 1993, Thriftway filed a motion for summary judgment as to both of the causes of action on the basis that Respondent could not establish each of the required elements for either of the claims. (R.P. 14). The trial court had scheduled a hearing on the motion for January 10, 1994, but at the request of Respondent, the hearing was rescheduled for May 6, 1994. (R.P. 20). Following the hearing, the trial court issued a written decision in which it denied the motion and stated that the motion could be renewed at the conclusion of discovery. (R.P. 32).

On April 7, 1995, approximately a year and a half after Thriftway's initial motion for summary judgment was filed and a year after the hearing on the motion, Respondent filed a certificate of readiness for trial with the trial court. (R.P. 42). On June 20, 1995, Thriftway, Mr. Clayton, and Mr. Dalley (collectively referred to as "Thriftway"), filed a motion for summary judgment as to both claims on the basis that Respondent could not establish each of the required elements for either of the causes of action. (R.P. 54). Pursuant to the memorandum brief filed in support of the motion, Thriftway also renewed its motion for summary judgment of November 8, 1993. (S.R.P. 81). Following full briefing and a hearing, the trial court issued its written decision in which it granted

Thriftway's motion based on its finding that Thriftway, Mr. Clayton, and Mr. Dalley "possessed reasonable and probable cause to initiate and prosecute the prior [legal action by Thriftway (not Mr. Clayton or Mr. Dalley) against Respondent]" and its finding that Thriftway, Mr. Clayton, and Mr. Dalley "possessed no ulterior motive or improper purpose in instituting or prosecuting" the underlying action. (R.P. 80).

Respondent appealed the trial court's grant of summary judgment. (R.P. 84). The Court of Appeals of the State of New Mexico proposed summary affirmance in its initial calendar notice. *Calendar Notice*, No. 16,842, App. 54 (N.M. Ct. App., Feb. 7, 1996). Following consideration of Respondent's brief in opposition to the proposed affirmance, the Court of Appeals of the State of New Mexico, by memorandum opinion, affirmed the trial court's grant of summary judgment in Thriftway's favor on both the abuse of process claim and the malicious prosecution claim. *Memorandum Opinion*, No. 16,842, App. 47 (N.M. Ct. App., Mar. 25, 1996).

Respondent then petitioned for review by the Supreme Court of the State of New Mexico. That court issued its decision on December 22, 1997. *Opinion*, Docket No. 23,581 (N.M. Sup. Ct., Dec. 22, 1997). In its opinion, the court created a new cause of action entitled "malicious abuse of process" and determined that genuine issues of fact existed under the new tort such that reversal of the earlier grant of summary judgment was appropriate. *Id.*, App. 38.

The questions sought to be reviewed here were not raised in the proceedings within the New Mexico court

system because they did not arise until the opinion of the Supreme Court of the State of New Mexico was issued. Petitioners are, and have been, without any plain, adequate remedy or procedure with which to raise the questions presented here in the New Mexico courts.

ARGUMENT FOR ALLOWANCE OF WRIT

There exist compelling reasons for granting the petition for writ of certiorari in this instance because the Supreme Court of the State of New Mexico has issued an opinion which results in Petitioners being denied due process and equal protection of the law, as provided in and applied by way of the Fourteenth Amendment to the United States Constitution: This opinion also conflicts with decisions of various United States courts of appeals and a decision by a state court of last resort. In addition, that opinion imposes a legal standard which is in conflict with the standard previously established in a decision of the Court.

I. THE OPINION OF THE SUPREME COURT OF THE STATE OF NEW MEXICO DENIES PETITIONERS THE DUE PROCESS OF LAW RIGHT TO COUNSEL BECAUSE THE OPINION ESTABLISHES THAT THE DISCUSSIONS BETWEEN COUNSEL AND PETITIONERS AND THE CIRCUMSTANCES OF COUNSEL'S PRE-SUIT INVESTIGATION CONDUCTED ON BEHALF OF PETITIONERS ARE SUBJECT TO DISCOVERY

In creating a new cause of action under New Mexico law, the Supreme Court of the State of New Mexico

expressly provided that in determining whether or not a party can prevail on the malicious abuse of process action, that party is permitted to conduct discovery regarding the communications between the opposing party and counsel, as well as the thoughts of counsel, and the actions of counsel in relation to his or her representation of the party. Specifically, the court provided that in attempting to prove a "malicious abuse of process" cause of action under New Mexico law, a party is entitled to delve into " 'what the [opposing] attorney or litigant knew and believed at the relevant time' " and the "prefiling investigation of the law" conducted by the opposing attorney. Opinion, App. 17 (n. 2), 32.

The unavoidable practical effect of the court's determination is that the attorney-client privilege is eviscerated for a party against whom a "malicious abuse of process" cause of action is asserted. *See id.* Essentially anything said, done, or thought by counsel in relation to the representation of a client is relevant and discoverable in such an action. This impermissible intrusion upon the attorney-client relationship and the attorney's work product constitutes a denial of the right to counsel, which in turn is a denial of due process. *See Reynolds v. Cochran*, 365 U.S. 525, 530-31 (1961) (legal procedure which resulted in criminal defendant being denied the assistance of counsel determined to constitute denial of due process of law).

In *Reynolds*, the Court provided that " '[i]f in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and,

therefore, of due process in the constitutional sense.' " *Id.* (*quoting Powell v. Alabama*, 287 U.S. 45 (1932)). The directive of the court in the present proceeding results in Petitioners being denied the right to representation, not only by their counsel of choice, but by any counsel because the practical effect of the court's opinion is the evisceration of the attorney-client confidentiality privilege. *See McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1262 (5th Cir. 1983) (the constitutional right of a party to be represented by counsel in a civil action arises from due process protections); *Dreher v. Sielaff*, 636 F.2d 1141, 1143 (7th Cir. 1980) ("the opportunity to communicate privately with an attorney is an important part of [the] meaningful access" to the court system guaranteed by the Fourteenth Amendment"); *Mosley v. St. Louis Southwestern Railway*, 634 F.2d 942, 945 (5th Cir. 1981) ("The right to the advice and assistance of retained counsel in civil litigation is implicit in the concept of due process" . . . "[t]his right inheres in the very notion of an adversarial system of justice, and is indispensable to the effective protection of individual rights." (citations omitted)).

The opinion of the Supreme Court of the State of New Mexico denies Petitioners due process of law because the opinion denies Petitioners the opportunity for meaningful representation of counsel. That opinion also conflicts with the decisions of the Fifth and Seventh Circuits cited *supra*. Accordingly, this petition for writ of certiorari should be granted, and the opinion at issue reversed.

II. THE OPINION DENIES PETITIONERS EQUAL PROTECTION OF THE LAW BECAUSE THE OPINION ESTABLISHES THAT PETITIONERS ARE HELD TO A HIGHER STANDARD THAN A SIMILARLY SITUATED PRO SE LITIGANT

In reversing the trial court's summary judgment determination that Petitioners had "probable cause" to proceed with the initial legal proceeding, the Supreme Court of the State of New Mexico "conclude[d]" that "based upon a reasonable *pre-filing investigation of the law*" of defamation, Thriftway should have anticipated both that it could be considered a limited public figure and that [Respondent's] statements would be considered a matter of existing public controversy." Opinion, App. 31 (emphasis added). Solely because Petitioners had counsel, the Supreme Court of the State of New Mexico has determined that Petitioners must have had more than merely a reasonable belief, in essence, more than "probable cause" to believe they had a reasonable chance of prevailing on the merits of the initial lawsuit. Petitioners must have conducted a "reasonable" "pre-filing investigation of the law." *Id.* A party bringing an action pro se could not be held to the same standard. *See id.* Accordingly, the opinion of the court denies Petitioners equal protection of the law because Petitioners are held to a higher legal standard merely because they are represented by counsel.

In *Jones v. Union Guano Company*, the Court established that the Fourteenth Amendment "does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real and

the condition imposed has reasonable relation to a legitimate object." *Id.* 264 U.S. 171 (1923). In the present proceeding, there is no "reasonable relation" to anything which can be construed as a "legitimate" objective in relation to the Supreme Court of the State of New Mexico imposing a higher legal standard on Petitioners in comparison to that which would be imposed on a pro se party. *See id.*

The court's distinction between the class of parties represented by counsel and the class of those unrepresented by counsel inappropriately denies Petitioners equal protection of law. Consideration of authority from other lower courts supports the conclusion that the distinction imposed by the New Mexico court is in conflict with the Fourteenth Amendment. *See Joyce v. Mavromatis,* 783 F.2d 56, 57 (6th Cir. 1986) (equal protection claim for denial of access to courts may be based on an "unreasonable classification"); *Moses v. Hoebel,* 646 P.2d 601, 605 (Okl. 1982).

In determining that a lower court's unreasonable distinction between and treatment of classes of litigants was in violation of the Fourteenth Amendment, the Supreme Court of the State of Oklahoma in *Moses* reasoned as follows:

> Lastly, the trial court's order cannot withstand the scrutiny of the Equal Protection Clause of the federal constitution. XIVth Amend., U.S. Const. Persons may be grouped for legislation in different categories so long as the basis for the classification abridges no one's fundamental right and there is some rational basis for the distinction. A classification which

> endeavors to restrain fundamental interests will be subjected to strict scrutiny. Persons with claims to litigate cannot be singled out for a vastly different treatment and barred from court simply because they have failed to satisfy an adjudicated obligation. . . . An order that so conditions one's right to litigate impermissibly denies equal protection.

Id., 646 P.2d at 605 (footnote omitted).

The Supreme Court of the State of New Mexico's application of varying legal standards based upon the classification of whether the party is represented by counsel or proceeding pro se denies Petitioners equal protection of the law, and conflicts with the decisions of the Sixth Circuit and court of last resort in the State of Oklahoma. Accordingly, this petition for writ of certiorari should be granted, and the opinion reversed.

III. THE SUPREME COURT OF THE STATE OF NEW MEXICO HAS ADOPTED A LEGAL STANDARD IN CONFLICT WITH THAT ESTABLISHED BY THE COURT

In combining the tort of malicious prosecution and abuse of process into a single new tort, "malicious abuse of process", the Supreme Court of the State of New Mexico stated that the existence of "probable cause" to assert a claim at the time a legal proceeding is initiated would be a defense to a later claim that the filing of the initial legal proceeding was improper. Opinion, App. 16-18, 20. The court defined "probable cause" as a "reasonable belief, founded on known facts established after a reasonable pre-filing investigation". App. 17. However,

the court, in fact, established a much higher legal standard. *Id.* This legal standard is in direct conflict with that previously established by the Court.

In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, the Court stated:

> [t]he notion of probable cause, as understood and applied in the common-law tort of wrongful civil proceedings, requires the plaintiff to prove that the defendant lacked probable cause to institute an unsuccessful civil lawsuit and that the defendant pressed the action for an improper, malicious purpose. . . . Probable cause to institute civil proceedings requires no more than a 'reasonabl[e] belie[f]' that there is a chance that [a] claim may be held valid upon adjudication.

Id., 508 U.S. 49, 62-63 (1993) (footnote omitted) (citations omitted). The Court further provided that "[b]ecause the absence of probable cause is an essential element of the tort, the existence of probable cause is an absolute defense." *Id.* at 63.

In contrast to the "probable cause" standard established by the Court, which essentially amounts to a reasonable belief of prevailing in asserting a legal cause of action, the Supreme Court of the State of New Mexico further required in the Opinion (1) that part of the "focus [be] on 'what the attorney or litigant knew and believed at the relevant time' "; (2) that the various subjective motives of a litigant be weighed; (3) that the "pre-filing investigation of the law" of the party who filed the alleged wrongful civil action be "reasonable"; (4) that Petitioners should have had knowledge as to Respondent

having "spoken with actual malice" (which clearly requires legal evaluation); and (5) that the existence of probable cause be proved by "clear and convincing evidence" in certain instances. Opinion, App. 17 (n. 2), 18-21, 32.

This standard is in direct conflict with the legal standard established by the Court. *See Professional Real Estate Investors, Inc.*, 508 U.S. at 62-63. Accordingly, this petition for writ of certiorari should be granted, and the opinion of the Supreme Court of the State of New Mexico should be reversed.

CONCLUSION

The Opinion brought here for review denies Petitioners' due process right to counsel, equal protection right of access to the courts, and is in conflict with precedent of the Court. For all of the foregoing, Petitioners respectfully request that the Court grant this Petition.

Respectfully submitted,

F.D. MOELLER
ROBERT D. BENSON
JOHN F. DIETZ

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IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

Opinion Number: _____

(Filed Dec. 22, 1997)

Docket No. 23,581

DAVID DEVANEY,

Plaintiff-Petitioner,

vs.

THRIFTWAY MARKETING CORPORATION, JERRY CLAYTON, AND R. J. DALLEY,

Defendants-Respondents.

ORIGINAL PROCEEDING ON CERTIORARI
Benjamin S. Eastburn, District Judge

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OPINION

MINZNER, Justice.

Plaintiff-Petitioner David DeVaney brought a tort action seeking damages for abuse of process and malicious prosecution. The trial court granted Defendants-

Respondents Thriftway Marketing Corporation and its officers (collectively, "Thriftway") summary judgment, and the Court of Appeals affirmed. We granted certiorari to revisit and clarify the elements required for the two torts on which DeVaney relies. Specifically, we address two issues: (1) whether, in an abuse of process claim, filing a complaint for an improper purpose may serve as the requisite improper act, and (2) whether the "special injury" requirement for a malicious prosecution claim may be satisfied by a showing that a plaintiff is no longer able to work in his or her chosen occupation. We conclude that the torts of malicious prosecution and abuse of process should be restated as a single tort known as malicious abuse of process. Also, we abolish the "special injury" requirement for a malicious abuse of process claim, and therefore, we need not decide whether DeVaney's inability to secure employment fits within the realm of "special injury." Because we believe genuine issues of material fact preclude judgment as a matter of law, we reverse and remand.

I. FACTS AND PROCEDURE

Thriftway owns and operates several convenience stores within the boundaries of the Navajo Nation, in Farmington, and in surrounding communities. DeVaney was formerly a manager at a Thriftway store located within the Navajo Nation. An article appeared in the September 19, 1991, edition of the Navajo Times, a newspaper circulated and read throughout the Navajo Nation and surrounding communities including Farmington and Gallup. The article stated that DeVaney made the following negative comments about Thriftway: "I don't think

the company [Thriftway] really cares about the Navajo people even though they have a lot of stores here on the reservation," and, "They [Thriftway] had cut their prices so much in Farmington that they weren't making any money so they had to increase the price of the gasoline on the reservation to bring in the profits."

The article also contained comments to the effect that Thriftway practiced a course of conduct in which store managers were fired after only a year or two of service without regard for the wishes of the communities in which they worked and that Thriftway was insensitive to the Navajo culture both by hiring employees without regard for their ability to understand Navajo culture and by failing to provide any training on Navajo culture after they were hired.

Thereafter, Thriftway sued DeVaney for defamation and interference with business relations, alleging that it was damaged by DeVaney's comments because they caused public contempt for the company. Specifically, Thriftway believed that its then-pending negotiations with the Navajo Nation to complete a business transaction failed because of the negative comments DeVaney made publicly.

In the action initiated by Thriftway, DeVaney moved to dismiss both counts. Devaney asserts that, at a hearing, the judge indicated that he would dismiss the count for intentional interference with business relations but would not dismiss the count for defamation. Thriftway then filed a motion for default judgment before the expiration of the time limitation on the filing of DeVaney's answer. The court did not grant Thriftway's motion. Additionally,

DeVaney alleges that one of Thriftway's employees failed to appear for a scheduled out-of-town deposition. Thriftway also resisted requests for discovery of relevant information within the exclusive control of Thriftway. Specifically, Thriftway refused to produce documents containing information about Thriftway's gas prices within the Navajo Nation compared with those in Farmington and other communities and documents pertaining to Thriftway's personnel practices in relation to its managers. When the court compelled disclosure of the necessary information, Thriftway dismissed its suit.

In the present complaint against Thriftway for malicious prosecution and abuse of process, DeVaney alleged that Thriftway "filed the lawsuit without probable cause or reasonable grounds to believe that it had been slandered, libelled or defamed, without probable cause or reasonable grounds to believe that any of its contractual or business relations had been interfered with, and without probable cause or reasonable grounds to believe that it had been damaged by any act of [DeVaney]." DeVaney alleged that Thriftway's suit was filed in order to silence his criticism of Thriftway's business practices and to obtain a retraction of the criticisms. He contends on appeal that these motives provide a basis for a claim of malicious prosecution as well as abuse of process. DeVaney highlighted Thriftway's actions of prematurely filing a default motion, abusing discovery and dismissing the suit in response to an order compelling discovery, as instances of improper conduct during its suit against him.

Thriftway moved for summary judgment, seeking to show that DeVaney could not establish one or more of the essential elements of the torts on which he based his

complaint. The trial court ruled in favor of Thriftway on both counts. The district court concluded that DeVaney's statements were actionable. The court found that Thriftway "possessed reasonable and probable cause to initiate and prosecute the prior lawsuit." The court also found that it "possessed no ulterior motive or improper purpose in instituting or prosecuting that action." The district court granted Thriftway's motion for summary judgment and dismissed Devaney's complaint. The Court of Appeals affirmed dismissal of both claims, but for other reasons. On the abuse of process claim, the Court of Appeals assumed existence of an improper motive, but held that a subsequent improper act "amount[ing] to extortion," was required in addition to filing the complaint. On the malicious prosecution claim, the Court of Appeals did not decide whether Thriftway had reasonable grounds to sue DeVaney, but held that DeVaney failed to prove "special damages", a required element for the tort.

We granted certiorari in order to re-examine the elements of the two torts in light of *Richardson v. Rutherford*, 109 N.M. 495, 787 P.2d 414 (1990). In *Richardson*, we explained that, "[w]hile a subsequent act may suffice to prove an abuse of process which was appropriate when issued, it is not an essential element." *Id.* at 502, 787 P.2d at 421. We questioned the necessity of the special damages requirement in an action for abuse of process. *See id.* at 501 n.3, 787 P.2d at 420 n.3. Subsequently, our Court of Appeals interpreted *Richardson* to mean that "the improper act required for an abuse of process claim could be the filing of the complaint itself and that an improper subsequent act was not required." *Westland Dev. Co. v.*

Romero, 117 N.M. 292, 294, 871 P.2d 388, 390 (Ct. App. 1994). In the present action, the Court of Appeals construed *Richardson* and *Westland* as allowing "for the possibility that under certain, very limited and special circumstances the filing of suit could be enough." *DeVaney v. Thriftway*, NMCA 16,842, slip op. at 3 (March 25, 1996). We now reverse.

II. STANDARD OF REVIEW

"In reviewing a grant of summary judgment, we must determine whether the moving party has demonstrated that there is no genuine issue of material fact and is therefore entitled to judgment as a matter of law." *Gonzales v. Allstate Ins., Co.*, 1996 NMSC 041, 122 N.M. 137, 139, 921 P.2d 944, 946. When a defendant seeks summary judgment against a plaintiff, the defendant might attempt to negate one of the essential elements of the plaintiff's claim. *Blauwkamp v. University of New Mexico Hosp.*, 114 N.M. 228, 231-32, 836 P.2d 1249, 1252-53 (Ct. App. 1992). In an action for abuse of process, for example, the Court of Appeals has sustained summary judgment on the basis that a plaintiff was not able to show an act in "the use of process other than such as would be proper in the regular prosecution of the charge." *Burgett v. Apprill*, 100 N.M. 72, 75, 665 P.2d 1163, 1166 (Ct. App. 1983) (quoting *Farmers Gin Co. v. Ward*, 73 N.M. 405, 407, 389 P.2d 9, 11 (1964)). In an action for malicious prosecution, the Court of Appeals has sustained summary judgment on the basis that the plaintiff had not shown a lack of probable cause for initiating criminal proceedings. *Somerstein v. Gutierrez*, 85 N.M. 130, 132, 509 P.2d 897, 899 (Ct. App. 1973).

Thriftway moved for summary judgment on various grounds. Thriftway argued that DeVaney could not establish that it lacked probable cause in suing him or that he had suffered special damages. Thus, Thriftway argued, DeVaney could not establish essential elements of the claim for malicious prosecution. Thriftway also contended that DeVaney could not establish it proceeded for an ulterior motive or committed an act that was not a proper part of the regular pursuit of its claim. Thus, it contended he could not establish essential elements of the claim for abuse of process. In order to evaluate the soundness of Thriftway's motion, we first consider the elements of the two torts as they have developed in New Mexico.

In New Mexico, abuse of process has required: (1) the existence of an ulterior motive; (2) an act using process other than that which would be proper in the regular prosecution of the charge; and (3) damages. *Ruiz v. Varan*, 110 N.M. 478, 480, 797 P.2d 267, 269 (1990). Abuse of process has required that the defendant's primary motive was to accomplish an illegitimate end by an overt act designed to effect such end. *Richardson*, 109 N.M. at 502, 787 P.2d at 421. By contrast, in order to maintain an action for the malicious institution of a civil proceeding, a plaintiff has had the burden of establishing: (1) the institution of civil proceedings by the defendant; (2) malice; (3) a lack of probable cause; (4) termination of such proceedings in plaintiff's favor; and (5) damages. *See generally* 4E Louis R. Frumer & Melvin I. Friedman, *Personal Injury: Actions, Defenses, Damages*, Malicious Prosecution and Abuse of Process § 2.01[3] (1997) [hereinafter Frumer];

Restatement (Second) of Torts §§ 674(e), 681 (1977) (characterizing civil counterpart to malicious prosecution as wrongful civil proceedings). New Mexico courts traditionally have required proof of special damages in order to maintain a claim for malicious prosecution. *E.g., Johnson v. Walker-Smith Co.*, 47 N.M. 310, 312, 142 P.2d 546, 547 (1943).

For the reasons that follow, we conclude that the torts of abuse of process and malicious prosecution should no longer be separate causes of action. We therefore depart from the tradition requiring special damages and otherwise restate the elements of these two torts as a single cause of action.

III. ABUSE OF PROCESS AND MALICIOUS PROSECUTION COMPARED

Many courts and litigants have experienced a great deal of difficulty in distinguishing a claim of abuse of process from one of malicious prosecution because these two torts are closely related. *See, e.g., Simon v. Navon*, 71 F.3d 9, 15 (1st Cir. 1995); *Westland*, 117 N.M. at 293, 871 P.2d at 389. Originally, the tort of abuse of process was created in order to alleviate the harsh procedural requirements of malicious prosecution. *Yost v. Torok*, 344 S.E.2d 414, 415 (Ga. 1986) ("The tort of malicious abuse arose as a modification of the tort of malicious use, to provide relief where the procedural requirements of malicious use could not be met."); *see Clark Equip. Co. v. Wheat*, 154 Cal.Rptr. 874, 885 (Ct. App. 1979) ("The tort [of abuse of process] evolved as a 'catch-all' category to cover improper uses of the judicial machinery that did not fit

within the earlier established *but narrowly circumscribed*, action for malicious prosecution."). Steadily, however, these two torts have become less distinguishable.

We believe the confusion between these two separate torts arises from a commonality in their purpose and their elements. Both torts are designed to offer redress to a plaintiff who has been made the subject of legal process improperly, where the action was wrongfully brought by a defendant merely for the purpose of vexing or injuring the plaintiff, and resulting in damage to his or her personal rights. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 119, at 870 (5th ed. 1984) [hereinafter Prosser & Keeton] ("The interest in freedom from unjustifiable litigation is protected by actions for malicious prosecution and abuse of process."). Further, both torts represent an attempt to strike a balance between the interest in protecting litigants' right of access to the courts and the interest in protecting citizens from unfounded or illegitimate applications of the power of the state through the misuse of the courts. *See, e.g., Protect Our Mountain Env't. Inc. v. District Court*, 677 P.2d 1361, 1368 (Colo. 1984) (discussing abuse of process); *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 728 P.2d 1202, 1209 (Cal. 1986) (discussing malicious prosecution).

Additionally, the elements of both torts are similar. Abuse of process requires an improper act, a primary improper motive, and damages. Malicious prosecution requires initiation of proceedings, a lack of probable cause, favorable termination, malice, and damages. While these elements may appear and even sometimes, on particular facts, actually may be distinguishable, they serve

similar interests. The requirements of improper purpose for abuse of process and of malice for malicious prosecution are substantially similar. *See Aranson v. Schroeder*, 671 A.2d 1023, 1027 (N.H. 1996) (stating that "malicious prosecution and abuse of process 'have the common element of an improper purpose in the use of legal process, and there are many cases in which they overlap and either will lie' ") (quoting Prosser & Keeton, *supra*, § 121, at 898); *see also Prewitt v. Sexton*, 777 S.W.2d 891, 894 (Ky. 1989) ("What is often loosely labeled proof of 'malice' is more specifically defined in the Restatement as bringing the prior lawsuit 'primarily for a purpose other than that of securing the proper adjudication of the claim.' ") (quoting Restatement (Second) of Torts § 676). The institution of proceedings without probable cause, an element of malicious prosecution, can be characterized as an act not proper in the regular course of proceedings, an element of abuse of process. Also, the requirement of a favorable termination represents a procedural and evidentiary safeguard with respect to a showing of lack of probable cause. *See DeLaurentis v. City of New Haven*, 597 A.2d 807, 820 (Conn. 1991) (stating that a favorable termination is "relevant to the issue of probable cause"); *Cult Awareness Network v. Church of Scientology Int'l*, 685 N.E.2d 1347, 1353 (Ill. 1997) ("[A] favorable termination is limited to only those legal dispositions that can give rise to an inference of lack of probable cause."). As this similarity of elements shows, malicious prosecution probably is better understood as a specific application of the more general tort of abuse of process.

Finally, two recent developments have further obscured the differences between these two torts. First,

the "American Rule" rejection of the requirement of special damages, which we adopt today, removes any potential distinction between the two torts under the element of damages. Second, this Court has allowed a claim for abuse of process without requiring an act subsequent to the filing of a complaint, *Richardson*, 109 N.M. at 502, 787 P.2d at 421, making abuse of process even less distinguishable from malicious prosecution. *Westland*, 117 N.M. at 294, 871 P.2d at 390 (stating that *Richardson* "arguably might be read as blurring the line between malicious prosecution and abuse of process").

IV. THE TORT OF MALICIOUS ABUSE OF PROCESS

Based on these similarities, we believe that there is no longer a principled reason for characterizing these two forms of misuse of process as separate causes of action. *See Yost*, 344 S.E.2d at 417 (reformulating malicious use of process and malicious abuse of process into a single tort of abusive litigation); 1 Fowler V. Harper, et al., *The Law of Torts* § 4.9, at 497-98 (2nd ed. 1986) [hereinafter Harper] ("Both actions deal with the same problem – the perversion of the legal system. The problem has been treated as two somewhat separate torts mainly for reasons of convenience, and not because it is at all important in principle that the actions be kept distinct from each other."); *see also Simon*, 71 F.3d at 15 (stating that there is an "overlap between malicious prosecution and abuse of process"). As a result, we conclude that these torts should be restated as a single cause of action, which shall be known as "malicious abuse of process," and which shall be defined by the following elements: (1) the initiation of judicial

proceedings against the plaintiff by the defendant; (2) an act by the defendant in the use of process other than such as would be proper in the regular prosecution of the claim; (3) a primary motive by the defendant in misusing the process to accomplish an illegitimate end; and (4) damages. In short, there must be both a misuse of the power of the judiciary by a litigant and a malicious motive.

A. Initiation of Proceedings and the Overt Act Requirement

With respect to the requirement of an improper act, DeVaney suggests that *Richardson* stands for the proposition that a complaint alone filed for an improper purpose is sufficient to warrant tort liability, *see Richardson*, 109 N.M. at 502, 787 P.2d at 421 ("The initial use of process itself may constitute the required overt act under the facts."). We note that this view would render obsolete the important requirement of a lack of probable cause under the former tort of malicious prosecution. *Oren Royal Oaks*, 728 P.2d at 1209-10; *see also Westland*, 117 N.M. at 294, 871 P.2d at 390 ("[W]e do not believe our Supreme Court intended to do away with the distinction between abuse of process and malicious prosecution."). While we believe malicious prosecution and abuse of process should no longer be separate causes of action, we recognize that many of the traditional elements of both torts continue to serve important purposes. Specifically, the traditional elements of a lack of probable cause under the former tort of malicious prosecution and of an act not proper in the regular prosecution of a claim under the former tort of abuse of process serve to protect the important interest of

access to the courts, thereby preventing any chilling effect on the legitimate use of process. *Oren Royal Oaks*, 728 P.2d at 1209-10 (stating that "the lack-of-probable-cause requirement in the malicious prosecution tort plays a crucial role in protecting the right to seek judicial relief" and in preventing an "improper 'chilling' of the right to seek redress in court."); *see* Harper, *supra*, § 4.9, at 498 ("[S]tandardized barriers to the malicious prosecution action have been erected in the interest of assuring that it is available only in cases of clear perversion.").

1. Access to the Courts

Meaningful access to the courts is a right of fundamental importance in our system of justice. "The right of access to the courts is one aspect of the right to petition the government for redress of grievances, as guaranteed by the First Amendment to the U .S. Constitution, and also is protected by the provisions protecting due process of law, as set out in the Fourteenth Amendment to the U.S.Constitution and in Article II, Section 18, of the New Mexico Constitution." *Board of Educ. of Carlsbad Mun. Sch. v. Harrell*, 118 N.M. 470, 480, 882 P.2d 511, 521 (1994); *accord Richardson v. Carnegie Library Restaurant, Inc.*, 107 N.M. 688, 696-99, 763 P.2d 1153, 1161-64 (1988); *Jiron v. Mahlab*, 99 N.M. 425, 426, 659 P.2d 311, 312 (1983); *Moongate Water Co. v. State*, 120 N.M. 399, 405, 902 P.2d 554, 560 (Ct. App. 1995); *see Nordgren v. Milliken*, 762 F.2d 851, 853-54 (10th Cir. 1985) (stating that the right of access to the courts is also protected by the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment). Because of the potential chilling effect on the right

of access to the courts, the tort of malicious prosecution is disfavored in the law. *See, e.g., Rashidi v. Albright,* 818 F.Supp. 1354, 1359 (D.Nev. 1993), *aff'd mem.,* 39 F.3d 1188 (9th Cir. 1994); *Brough v. Foley,* 572 A.2d 63, 66 (R.I. 1990) (stating that malicious prosecution is "traditionally disfavored because of the belief that [it] tend[s] to deter the prosecution of crimes and/or chill free access to the courts"); *Chittenden Trust Co. v. Marshall,* 507 A.2d 965, 969 (Vt. 1986) ("[C]laims of malicious prosecution are not favored in the law . . . because '[t]hey have an undesirable tendency to unduly discourage citizens from seeking redress in the courts.' " (quoting *Annello v. Vinci,* 458 A.2d 1117, 1120 (Vt. 1983))). Thus, we must construe the tort of malicious abuse of process narrowly in order to protect the right of access to the courts. *See Wolfgram v. Wells Fargo Bank,* 61 Cal.Rptr.2d 694, 703 (Ct. App., review den.) ("[A]ny impairment of the right to petition . . . must be narrowly drawn."), *cert. denied,* 118 S.Ct. 347 (1997).[1]

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[1] In fact, the importance of the right to petition, and the potential chilling effect of tort liability, has caused the courts of some states to apply the more stringent requirements of the *Noerr-Pennington* doctrine, *United Mine Workers v. Pennington,* 381 U.S. 657, 669-72 (1965); *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 144 (1961), to actions for malicious prosecution and abuse of process. *See City of Long Beach v. Bozek,* 183 Cal.Rptr. 86, 88-93 (1982), *vacated,* 459 U.S. 1095, *reiterated on independent state constitutional grounds,* 190 Cal.Rptr. 918, 919 (1983) (holding that the right to petition insulates private litigants from retaliatory malicious prosecution actions by the government); *Protect Our Mountain Env't,* 677 P.2d at 1366-69 (abuse of process); *Cove Road Dev. v. Western Cranston Indus. Park Assoc.,* 674 A.2d 1234, 1237 (R.I. 1996) (applying the "sham exception" analysis to malicious prosecution actions and stating that "the constitutional

2. The Misuse of Process

With these considerations in mind, we now clarify our holding in *Richardson*. An improper act, or misuse of process, need not occur subsequent to the filing of a complaint and might, in fact, be found in the complaint itself, *see Richardson*, 109 N.M. at 502-03, 787 P.2d at 421-22 (allowing a claim for abuse of process based on a request for excessive damages contained in the complaint, in light of a lack of reasonable investigation into the extent of injury, and based on excessive attachments to the complaint), or even precede the filing of a complaint, *see* Prosser & Keeton, *supra*, § 121, at 898 ("[A] demand for collateral advantage that occurs before the issuance of process may be actionable, so long as process does in fact issue at the defendant's behest, and as a part of the attempted extortion." (footnote omitted)). Nevertheless, the filing of a proper complaint with probable cause, and without any overt misuse of process, will not subject a litigant to liability for malicious abuse of process, even if it is the result of a malicious motive. *Richardson*, 109 N.M. at 502, 787 P.2d at 421 ("[T]here is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. . . . " (quoting Prosser & Keeton, *supra*, § 121, at 898)); *see Simon*, 71 F.3d at 16 ("Filing of a lawsuit is a 'regular' use of process, and therefore may not on its own fulfill the requirement of an

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protection of the right to petition is no less compelling in the context of common-law tort claims than in the framework of federal antitrust legislation"); *Pound Hill Corp. v. Perl*, 668 A.2d 1260, 1263 (R.I. 1996) (abuse of process).

abusive act, even if the decision to sue was influenced by a wrongful motive, purpose or intent.").

This is the position of the majority of states addressing the issue. *E.g., Laxalt v. McClatchy,* 622 F.Supp. 737, 752 (D.Nev. 1985) (citing cases); *Kollodge v. State,* 757 P.2d 1024, 1027 (Alaska 1988); *Oren Royal Oaks,* 728 P.2d at 1209 ("[T]he mere filing or maintenance of a lawsuit – even for an improper purpose – is not a proper basis for an abuse of process action. The overwhelming majority of out-of-state precedents have reached the same conclusion." (citations omitted)); *Curiano v. Suozzi,* 469 N.E.2d 1324, 1326 (N.Y. 1984) (stating that a complaint is legally incapable of being abused). The requirement of a misuse of process, in addition to the mere initiation of proceedings, serves to prevent a chilling effect on claims well-founded in fact and law and asserted for the legitimate purpose of redressing a grievance. *See Oren Royal Oaks,* 728 P.2d at 1209. In order to satisfy the misuse of process requirement, then, we conclude that there must be an overt act that is irregular or improper in the normal course of proceedings. There are two independent means of demonstrating a misuse of process.

a. Lack of Probable Cause

We believe the tort of malicious prosecution, as it developed, recognized that the filing of a complaint without probable cause is a form of misuse of process. We conclude that to demonstrate the overt act required in an action for malicious abuse of process, a plaintiff may show the defendant filed an action against that plaintiff without probable cause. For this purpose, we define

probable cause as the reasonable belief, founded on known facts established after a reasonable pre-filing investigation, *Business Guides, Inc. v. Chromatic Communications Enter.*, 498 U.S. 533, 549-51 (1991) discussing the investigative standard under Fed.R.Civ.P. 11),[2] that a claim can be established to the satisfaction of a court or jury. Restatement (Second) of Torts § 675; *see also Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 62-63 (1993). The lack of probable cause must be manifest. *See* Prosser & Keeton, *supra*, § 120, at 893 (stating that "want of probable cause must be 'very clearly proven' or 'very palpable' ") (footnotes omitted).

We believe the tort of malicious prosecution has required proof of a favorable termination as a procedural and evidentiary safeguard. We now conclude that favorable termination is not an element of an action for malicious abuse of process but rather that an unfavorable termination has significance in demonstrating the existence of probable cause. An unfavorable termination for the malicious-abuse-of-process plaintiff, meaning some form of recovery for the original-proceeding plaintiff, is

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[2] We note that we apply a subjective standard under Rule 1-011 NMRA 1997, as opposed to the objective standard under the Federal Rules of Civil Procedure, and focus on "what the attorney or litigant knew and believed at the relevant time." *Rivera v. Brazos Lodge Corp.*, 111 N.M. 670, 675, 808 P.2d 955, 960 (1991). Because of the additional requirement of malice in actions for malicious abuse of process, we see no contradiction between an objective standard in tort, requiring a reasonable pre-filing inquiry, and a subjective standard under our Rules of Civil Procedure.

"conclusive evidence of the existence of probable cause." *Id.* at 894; Restatement (Second) of Torts § 675 cmt. b.

i. Counterclaims

The requirement of a favorable termination in the action for malicious prosecution has affected the availability of a counterclaim by the defendant in the original proceeding. Many courts have discouraged counterclaims founded on a lack of probable cause in order to avoid jury confusion. *See, e.g., Westland,* 117 N.M. at 294, 871 P.2d at 390. However, the existence of probable cause in the underlying proceeding, that is, whether the facts amount to probable cause, is a question of law. *Leyser v. Field,* 5 N.M. 356, 362, 23 P. 173, 174 (1890); Restatement (Second) of Torts § 681B. Because we do not recognize favorable termination as an element of a cause of action for malicious abuse of process, we hold that such a claim may be raised by counterclaim. Cf. Wash.Rev.Code § 4.24.350(1) (1996) (allowing a counterclaim for malicious prosecution).

ii. Burden of Proof

We recognize that the traditional requirement of a favorable termination served the important function of procedurally safeguarding the right of access to the courts by honest litigants. The absolute defense available to the original-proceeding plaintiff of a favorable termination in the original proceeding is one such safeguard. As a result, we conclude that a malicious-abuse-of-process plaintiff alleging a lack of probable cause prior to a

termination of the underlying claim, for example by counterclaim in the original proceeding, must demonstrate the lack of probable cause by clear and convincing evidence, *see State v. Valdez* (In re Valdez), 88 N.M. 338, 343, 540 P.2d 818, 843 (1975) (requiring clear and convincing evidence in civil commitment proceedings and stating that "[t]he standard of 'clear and convincing' evidence is 'no stranger to the civil law.' " (quoting *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 285 (1966))); *but see Chavez v. Manville Products Corp.*, 108 N.M. 643, 649, 777 P.2d 371, 377 (1989) ("[T]he requirement of clear and convincing proof in civil cases is the exception rather than the rule. . . . "). *Cf. Ellis County State Bank v. Keever*, 888 S.W.2d 790, 792-94 (Tex. 1994) (5-4 decision) (rejecting clear and convincing evidence standard of proof for malicious prosecution, while noting that courts must be satisfied that "positive, clear, and satisfactory" proof exists); *id.* at 799-801 (Hecht, J., concurring in part and dissenting in part) (advocating a "heightened clear-and-convincing standard of evidentiary review" in malicious prosecution actions); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (requiring clear and convincing evidence to demonstrate actual malice in defamation actions in order to prevent the chilling of protected speech). "For evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true." *In re Sedillo*, 84 N.M. 10, 12, 498 P.2d 1353, 1355 (1972).

If a plaintiff chooses to delay the assertion of a malicious abuse of process claim until the termination of the underlying proceeding, the plaintiff must, instead, prove

a lack of probable cause by a preponderance of the evidence. *See* Restatement (Second) of Torts § 675 cmt. b ("[A] termination of civil proceedings by a competent tribunal adverse to the person initiating them is not evidence that they were brought without probable cause."). The availability of a favorable-termination defense adequately safeguards honest litigants so that a higher standard of proof is unnecessary. *See Keever*, 888 S.W.2d at 792-94.

In any event, a malicious-abuse-of-process plaintiff attempting to show a lack of probable cause must demonstrate, by the applicable standard of proof, that the opponent did not hold a reasonable belief in the validity of the allegations of fact or law of the underlying claim.[3] These principles are intended to help separate the legal issue of probable cause from the facts surrounding termination of the original proceeding.

b. Procedural Impropriety

The second general method of demonstrating a misuse of process is through some irregularity or impropriety suggesting extortion, delay, or harassment, conduct formerly actionable under the tort of abuse of process.

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[3] It is a defense for lack of probable cause that an unreasonable belief in the legal validity of a claim is based on advice of counsel "sought in good faith and given after full disclosure of all [known or readily knowable] relevant facts." Restatement § 675(b); *accord Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox*, 922 S.W.2d 327, 331-32 (Ark. 1996).

Under this method, the act might be a procedural irregularity, *Simon*, 71 F.3d at 15 ("Typical abuse of process cases involve misuse of such procedures as discovery, subpoenas, and attachment." (citations omitted)); *Richardson*, 109 N.M. at 502-503, 787 P.2d at 421-22, or might be an act that otherwise indicates the wrongful use of proceedings, such as an extortion attempt, Restatement (Second) of Torts § 682 cmt. b ("The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it."). *See Farmers Gin Co.*, 73 N.M. at 407-08, 389 P.2d at 11 (listing as forms of abuse of process "excessive execution on a judgment; attachment on property other than that involved in the litigation or in an excessive amount; oppressive conduct in connection with the arrest of a person or the seizure of property, such as illegal detention and conversion of personal property pending suit; extortion of excessive sums of money").

B. Primary Motive to Accomplish an Illegitimate End

Under the requirement of a primary improper motive, it is insufficient that the malicious-abuse-of-process defendant acted with ill will or spite. Prosser & Keeton, *supra*, § 121, at 897 ("[E]ven a pure spite motive is not sufficient where process is used only to accomplish the *result* for which it was created." (emphasis added)); *id.* § 120, at 894-95 ("[T]he plaintiff in a civil suit is always seeking his own ends."). There must be a purpose to accomplish an illegitimate end. *See* Restatement (Second)

of Torts § 676 (recommending liability for one who initiates proceedings "primarily for a purpose other than that of securing the proper adjudication of the claim"); *id.* § 682 (recommending liability for "[o]ne who uses a legal process . . . against another primarily to accomplish a purpose for which it is not designed").

The following are typical examples of the improper purposes that could serve as the basis for a malicious abuse of process action: (1) a litigant pursues a claim knowing that it is meritless; (2) a litigant pursues a claim primarily in order to deprive another of the beneficial use of his or her property in a manner unrelated to the merits of the claim; (3) a litigant misuses the law primarily for the purpose of harassment or delay; or (4) a litigant initiates proceedings primarily for the purpose of inducing settlement in an unrelated proceeding or for some other form of extortion. Restatement (Second) of Torts § 676 cmt. c. While an overt misuse of process, such as a lack of probable cause, or an excessive attachment, may support an inference of an improper purpose, "it may not be inferred from evidence of an improper purpose alone that there was not probable cause," Restatement (Second) of Torts § 669A cmt. b (incorporated by reference in Section 675 cmt. j), or that there was not a proper use of process, and the burden of proving the overt act by independent evidence remains upon the plaintiff. *See Leyser*, 5 N.M. at 362, 23 P. at 174 ("Malice . . . may be inferred by the jury from the want of probable cause. But the want of probable cause can not be inferred from any degree of even expressed malice. . . . "); *Bosler v. Shuck*, 714 P.2d 1231, 1235 (Wyo. 1986). The degree to which the

process has been misused will determine the strength of the permissible inference of an improper motive.

C. Damages

Two views have developed in American courts on what a plaintiff needs to prove in order to meet the damage requirement for the tort of malicious prosecution. 4E Frumer, *supra*, Malicious Prosecution and Abuse of Process § 1.03[5]. New Mexico has previously aligned itself with a minority of jurisdictions adhering to the English common law rule which requires a showing of special damages as an element of recovery for malicious prosecution.[4] *Id.* § 1.05[2][c] n.2. Special damages include an actual interference with the defendant's person or property, or damages suffered beyond those ordinarily resulting from a lawsuit:

> [A]n action will not lie for the prosecution of civil action with malice and without probable cause, where there has been no arrest of the person or seizure of the property of the defendant, or where the defendant has suffered no injuries except those which are the necessary result in all ordinary law suits.

Johnson, 47 N.M. at 312, 142 P.2d at 547, *quoted in Hollars v. Southern Pac. Trans. Co.*, 110 N.M. 103, 108, 792 P.2d 1146, 1151 (Ct. App. 1989).

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[4] The issue of special damages in the context of abuse of process has previously not been definitively resolved in New Mexico. *See Richardson*, 109 N.M. at 501 n.3, 787 P.2d at 420 n.3 (casting doubt on the application of the special damages requirement in abuse of process actions).

DeVaney argues that the special damages requirement is outdated and should be modified or abolished. For the reasons that follow, we believe the requirement serves no useful purpose and therefore should be abolished.

1. Background of the Special Injury Requirement

In England, prior to the development of private rights of action for vexatious litigation, the courts established an intricate system of internal sanctions and deterrents. Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 Yale L.J. 1218, 1221-23 (1979) [hereinafter *Historical Analysis*] (discussing the remedy of wer and the amercement system in which a monetary penalty for a false claim was paid to the court). In addition, several statutes were enacted providing for the taxation of litigation expenses against the unsuccessful litigant to be paid to the prevailing party. *Id.* at 1226-27. The subsequent development of private rights of action served to supplement the existing remedies and were, therefore, extraordinary remedies for damages incurred beyond the normal expenses of litigation. *Id.* at 1229. The modern action of malicious prosecution developed out of the action on the case in the nature of conspiracy. *Id.* at 1227-29. "[I]n the areas of possible damage beyond the perimeter of a costs award, the action on the case in the nature of conspiracy evolved into the English Rule for malicious prosecution." *Id.* at 1227. Because the defendant was thought to be adequately compensated under the statutes for other injuries, English

courts consistently refused to allow a private action to remedy vexatious litigation without the suffering of an arrest, a seizure of property, or some other special injury. *See Ackerman v. Kaufman*, 15 P.2d 966, 967 (Ariz. 1932).

2. Evolution of the Tort at American Common Law

Opponents of the English Rule argue that the special injury requirement has been an effective bar to malicious prosecution claims in jurisdictions adhering to the special damage rule. 4E Frumer, *supra*, Malicious Prosecution and Abuse of Process § 1.03[5], at 136. Courts have construed the requirement strictly. Damages such as increased insurance premiums, damage to professional reputation, loss of income during the pendency of the suit, mental suffering caused by the suit, and litigation expenses are considered normal expenses of defending a suit, and not "special injuries." *See id.* at 134-36; *Balthazar v. Dowling*, 382 N.E.2d 1257, 1259 (Ill. App. Ct. 1978); *see also Epps v. Vogel*, 454 A.2d 320, 324 (D.C. 1982) (loss of income); *Tarver v. Wills*, 330 S.E.2d 896, 898-99 (Ga. Ct. App. 1985) (increased insurance premiums); *Barnard v. Hartman*, 344 N.W.2d 53, 55 (Mich. Ct. App. 1983) (damage to professional reputation). In fact, experience has shown that courts have had much difficulty defining clearly what actually constitutes "special injury." "The immense variations in fact patterns which give rise to suits for malicious prosecution make generalization beyond the basic rules difficult, if not pointless." 4E Frumer, *supra*, Malicious Prosecution and Abuse of Process § 1.03[5], at 137.

Today, the requirement of special damages has been "severely criticized," and "a majority of the courts that have considered the issue . . . plac[e] no such limitations on the types of damage necessary in order to establish a tort claim of unjustified initiation of civil litigation." Harper, *supra*, § 4.8, at 475-76 (footnote listing cases omitted); *see also O'Toole v. Franklin*, 569 P.2d 561, 564 (Or. 1977) (listing the states which follow the special damages rule and those which do not). It appears that this trend toward the rejection of special damages is continuing. *See Greenberg v. Wolfberg*, 890 P.2d 895, 901 (Okla. 1995), *cert. denied*, 116 S.Ct. 1847 (1996); *see also* 42 Pa. Cons. Stat. Ann. § 8351(b) (West 1996). The "American Rule" rejection of special damages is consistent with the Restatement. See Restatement (Second) of Torts § 681. Finally, the "American Rule" abrogation of special damages appears to be related to the rule, also known as the "American Rule," *Montoya v. Villa Linda Mall. Ltd.*, 110 N.M. 128, 129, 793 P.2d 258, 259 (1990), requiring parties to bear their own attorney's fees. *See Historical Analysis, supra*, at 1229-31.

3. New Mexico Will Follow the Majority Rule

In view of the development of the tort over the course of time, we believe that the special damages limitation no longer serves the purposes of the tort itself, which allows victims of groundless suits to obtain adequate redress. The "right not to be unjustifiably involved in litigation, . . . to be free of unwarranted, sometimes vexatious, litigation is the essential interest sought to be protected" by the tort. 4E Frumer, *supra*, Malicious Prosecution and Abuse of Process § 1.01[1], at 6. A litigant

should be entitled to have his rights determined without the risk of being sued and having to respond in damages for seeking to enforce his rights. However, should the necessity arise, when a victim of groundless litigation seeks redress, the special damages requirement should not serve as a bar to recovery.

We also believe that the narrow purpose of providing an extraordinary remedy for damages other than costs, for which the special damages requirement was originally developed, is inapplicable in New Mexico. "New Mexico adheres to the so-called American rule that, absent statutory or other authority, litigants are responsible for their own attorney's fees." *Montoya*, 110 N.M. at 129, 793 P.2d at 259. As a result, a malicious abuse of process plaintiff will not have the benefit of fee-shifting in the underlying action. Even in the limited situations in which fee-shifting is available in the underlying action, *see, e.g., State ex rel. New Mexico State Highway and Transp. Dep't v. Baca*, 120 N.M. 1, 5, 896 P.2d 1148, 1152 (1995) (recognizing the inherent power of courts to award attorney's fees "for expenses incurred as a result of frivolous or vexatious litigation"), the award of costs, in most instances, will fail to adequately compensate the wrongly-sued defendant. *See* Prosser & Keeton, *supra*, § 120 at 889 (stating that "where the costs [awarded to successful litigants] are set by statute at trivial amounts . . . there can be no pretense at compensation even for the expenses of the litigation itself"); *see also Ackerman*, 15 P.2d at 967 (analyzing costs statute and stating that successful defendant in an action "can at best only recoup a very small portion of the damage inflicted"). Comprehensive compensation, then, is normally available only through an action sounding in

tort. Given the other elements safeguarding the legitimate use of process, we conclude that it is both unnecessary and somewhat arbitrary to limit tort liability to those instances in which a plaintiff suffers special damages. *See Greenberg*, 890 P.2d at 900-01 (rejecting special damages as unnecessary given the heavy burden of proof already imposed on the plaintiff); Prosser & Keeton, *supra*, § 120, at 890 ("[T]he plaintiff's heavy burden of proof provides sufficient protection to the honest litigant.").

For these reasons and consistent with our recognition that malicious prosecution and abuse of process should be restated as a single cause of action in order to achieve the ultimate, common purposes for which they were created, we decline to require special damages as a necessary element in a claim for malicious abuse of process. A malicious institution of civil proceedings without probable cause will be tortious even though there has been no showing of an arrest of the person or attachment of the property of the defendant, and no special injury sustained. A plaintiff may recover the normal expenses of defending against the underlying claim. Nonetheless, the plaintiff has the burden of demonstrating actual damages for all forms of harm, including reputational or emotional harm. *See Gertz*, 418 U.S. at 349-50 ("Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury.").

V. APPLICATION OF MALICIOUS ABUSE OF PROCESS TO DEVANEY'S CLAIM

The district court granted summary judgment on two grounds: (1) Thriftway had probable cause to sue

DeVaney for defamation and intentional interference with business relations; and (2) Thriftway had no ulterior motive in suing DeVaney. The Court of Appeals, in affirming the grant of summary judgment, relied on the alternative grounds that DeVaney had not suffered special damages and that Thriftway's acts did not rise to the level of abuse of process. We have already concluded that there is no requirement of special damages for the tort of malicious abuse of process. With respect to the other grounds relied upon below, DeVaney contends that there are genuine issues of material fact which preclude summary judgment. We agree.

A. Initiation of Proceedings and the Overt Act Requirement

DeVaney alleged, and Thriftway does not dispute, that Thriftway initiated civil proceedings against DeVaney for defamation and intentional interference with business relations. In his complaint, DeVaney also alleged two overt acts, a lack of probable cause and procedural improprieties, that could, separately, support the misuse of process element for malicious abuse of process. We conclude that there are genuine issues of material fact as to both types of misuse of process.

1. Lack of Probable Cause

DeVaney alleged that Thriftway filed suit against him without probable cause. The existence of probable cause is a matter of law and shall be decided by the trial judge.

Leyser, 5 N.M. at 362-63, 23 P. at 174; Restatement (Second) of Torts § 681B(1)(c). However, the circumstances surrounding the filing of the complaint, if in dispute, must be resolved by a fact-finder. *Leyser*, 5 N.M. at 362-63, 23 P. at 174; Restatement (Second) of Torts § 681B(2)(a). While the district court found that probable cause existed, we believe there were unresolved disputed facts, material to the issue of probable cause, which preclude the resolution of this issue as a matter of law.

Thriftway voluntarily dismissed its defamation claim against DeVaney. As a result, the action did not terminate in Thriftway's favor, and there is no conclusive presumption of probable cause. Because DeVaney asserted his claim after the termination of the earlier proceeding rather than alleging a lack of probable cause in a counterclaim, DeVaney must prove a lack of probable cause by a preponderance of the evidence.

DeVaney contends that Thriftway is a public figure and that the statements at issue involved matters of public concern. "Whether a person is a public figure is a question of law." *Marchiondo v. Brown*, 98 N.M. 394, 399, 649 P.2d 462, 467 (1982). At the time the article was published, Thriftway was negotiating with the Navajo Nation Economic Development Council (Council) for the sale of Thriftway's stores within the Navajo Nation. There were several articles appearing in the newspaper discussing Thriftway's business practices in relation to the negotiations both before and after the publication of the article with DeVaney's statements.[5] In addition, the

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[5] Thriftway argued in its answer brief that DeVaney raised certain facts, including the existence of other newspaper

buyout would affect more than merely the direct participants in the negotiations. For purposes of determining the appropriate standard in defamation actions, *see Wolston v. Reader's Digest Ass'n. Inc.*, 443 U.S. 157, 167 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979); *Gertz*, 418 U.S. at 342, each of these facts is relevant in evaluating Thriftway's status as a public or private figure. *See Little v. Breland*, 93 F.3d 755, 757 (11th Cir. 1996) (discussing the definition of a public controversy and considering whether the matter affects more than the direct participants); *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 688 (4th Cir. 1989) ("[A] plaintiff should not be considered a limited-purpose public figure absent the existence of a pre-defamation public controversy in which the plaintiff has become directly involved."). Based on these facts, we conclude that the subject of the buyout was a matter of public concern and created a public controversy in which Thriftway voluntarily injected itself. *Cf. Coronado Credit Union v. KOAT Television, Inc.*, 99 N.M. 233, 241, 656 P.2d 896, 904 (Ct. App. 1982) (concluding that a large credit union was a public figure with respect to statements involving matters of public concern). We also conclude that, based upon a reasonable pre-filing investigation of the law of defamation, Thriftway should have anticipated both that it would be considered a limited public figure and that DeVaney's statements would be considered a matter of existing public controversy. Thus, Thriftway should have known that it would have

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articles, for the first time on appeal. The record supports a conclusion that the facts on which we rely were properly before the trial court in ruling on the motion for summary judgment.

the burden of proving both that the statements were false and that DeVaney made the statements with knowledge of falsity or with a reckless disregard of the truth. *See Gertz*, 418 U.S. at 342; *cf. Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (stating that a private figure defamation plaintiff suing over a matter of public concern must demonstrate both falsity and fault).

DeVaney made statements about the business practices of Thriftway that were verifiable by documentation in the exclusive possession of Thriftway. Specifically, DeVaney stated that Thriftway's gas prices were higher within the Navajo Nation in order to compensate for a price war outside the Navajo Nation. DeVaney also stated that Thriftway frequently fired its managers after only a short time on the job, failed to adequately train managers in Navajo culture, and paid managers a relatively low wage. DeVaney contends that these statements were truthful and that Thriftway either knew or should have known, after a reasonable pre-filing inquiry, of the statements' veracity. Thriftway contends that these statements were false, yet it has refused to comply with requests for documentation which would likely demonstrate the falsity or truthfulness of the statements. Thriftway would not have been able to prove the defamation claim without the disclosure of its gas pricing system and its personnel practices. Thriftway must have known the issues of pricing and personnel relations would be raised in the case; the fact that it dismissed the case following the court's ruling compelling discovery might support an inference that the documents contained information demonstrating that DeVaney's statements were truthful. *Cult Awareness Network*, 685 N.E.2d at 1353 (stating that a dismissal may

give rise to an inference of a lack of probable cause under some circumstances); Restatement (Second) of Torts § 674 cmt. j ("Whether a withdrawal or an abandonment constitutes a final termination of the case in favor of the person against whom the proceedings are brought and whether the withdrawal is evidence of a lack of probable cause for their initiation, depends upon the circumstances under which the proceedings are withdrawn."). Without Thriftway's production of the documents, a jury might make such an inference, and the trial court then could conclude that Thriftway did not have probable cause in filing its claim against DeVaney because the information would have been readily available to Thriftway in a reasonable pre-filing inquiry. If Thriftway does produce the documents on remand, it is possible that this issue could be resolved as a matter of law.

In addition, Thriftway had the burden of proving by clear and convincing evidence that DeVaney made his statements with knowledge of falsity or with a reckless disregard of the truth. *See Gertz.*, 418 U.S. at 342. Thriftway introduced scant evidence supporting its allegation of malice. It has failed to introduce substantial evidence suggesting that DeVaney "entertained serious doubts as to the truth" of his statements, *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), other than his being fired from Thriftway for unrelated reasons. Because Thriftway knew or should have known of the high standard of proof on the issue of malice, we believe there is a genuine issue of material fact as to whether Thriftway held a reasonable belief that DeVaney spoke with actual malice.

DeVaney also contends that Thriftway had no reasonable basis to believe it had been damaged by the article at

the time it filed suit against DeVaney. Thriftway filed a complaint only fifteen days after the article appeared in the newspaper. Also, in depositions, representatives of Thriftway were equivocal about the basis for believing the article caused any harm to Thriftway. These facts might supply the basis for a reasonable inference of Thriftway's lack of reasonable belief that it had suffered any compensable damages. We conclude there are genuine issues of material fact on the issue of probable cause, and the district court erred in deciding that probable cause existed as a matter of law.[6]

2. Procedural Impropriety

DeVaney alleged that Thriftway misused the process of the court by failing to attend a deposition, prematurely

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[6] Because we conclude that there are genuine issues of material fact as to the existence of probable cause on the defamation claim, we need not address whether there are also genuine issues of material fact as to the existence of probable cause on the claim for intentional interference with business relations. We note, however, that the two claims are connected. In order to assert a claim for intentional interference with prospective business relations, a plaintiff must demonstrate either an improper motive, such as spite or vengeance, or an improper act, such as defamation. *Anderson v. Dairyland Ins. Co.*, 97 N.M. 155, 159, 637 P.2d 837, 841 (1981); *M & M Rental Tools, Inc. v. Milchem, Inc.*, 94 N.M. 449, 454, 612 P.2d 241, 246 (Ct. App. 1980). Similarly, in order to assert a claim for intentional interference with existing contractual relations, a plaintiff must demonstrate that "the interference is without justification or privilege." *Williams v. Ashcraft*, 72 N.M. 120, 121, 381 P.2d 55, 56 (1963). In addition, the existence of probable cause on the issue of damages involves a similar inquiry for both claims.

filing a motion for default judgment, refusing to comply with discovery requests, and dismissing its complaint. The Court of Appeals concluded that these acts were insufficient, as a matter of law, to fulfill the overt act requirement. We disagree.

While none of these acts were improper per se, each could rise to the level of a procedural abuse under certain circumstances. The voluntary dismissal of a complaint is a proper act contemplated by our rules of civil procedure. *See* Rule 1-041(A) NMRA 1997. In addition, the failure to produce documents in response to a discovery request is not improper if there is a legitimate basis for doing so. *See* Rule 1-034(B) NMRA 1997 (providing opportunity for objection to requests for production of documents); Rule 1-026(C) NMRA 1997 (providing for protective orders from discovery in limited circumstances). Finally, the failure to attend a deposition could be excusable under the right circumstances and not rise to the level of an improper act for purposes of a malicious abuse of process action. *See* Rule 1-037(D)(1), (3) NMRA 1997 (providing for discretionary sanctions for failure to appear at a scheduled deposition and a mandatory award of expenses "unless the court finds that the failure was substantially justified"); *cf. Kalosha v. Novick*, 77 N.M. 627, 630-31, 426 P.2d 598, 600-01 (1967) (discussing the need for a willful violation under a prior version of Rule 1-037(D)); *Sandoval v. United Nuclear Corp.*, 105 N.M. 105, 108, 729 P.2d 503, 506 (Ct. App. 1986) (same).

Nonetheless, these actions must be evaluated in context in order to determine whether they were improper. The documents Thriftway refused to produce would have

been necessary in proving the allegation of falsity. Thriftway could not reasonably anticipate carrying its burden of proof in the defamation action without having to disclose the information requested. In this context, Thriftway's refusal to comply with the discovery request may have been a misuse of process. The fact that Thriftway dismissed its suit after being compelled by the court to produce the documents could support an inference that there was not a legitimate basis for the failure to produce.

With respect to the failure to appear for deposition and premature filing for default judgment, Thriftway does not contest the substance of the allegations but rather contends that these acts were not sufficiently improper. For example, in the deposition of Defendant Dalley, he states that he missed the deposition in order to attend a business meeting. DeVaney contends that the surrounding circumstances could support an inference that Thriftway committed these procedural violations in order to delay its inevitable dismissal of the claim and to prolong the threat to DeVaney's non-tortious speech. We agree. We conclude that genuine issues of material fact remain.

B. Malice

Based on DeVaney's allegations, there are three possible bases for establishing Thriftway's malice in its alleged misuse of process: (1) filing the claim with knowledge that it was groundless; (2) pursuing the action primarily for the purpose of obtaining a retraction; and (3) pursuing the action and misusing process primarily for the purpose of intimidation in order to silence DeVaney's

non-tortious speech. The second form of malice alleged, attempting to obtain a retraction, does not constitute an improper purpose and cannot form the basis of a malicious abuse of process action. In order to constitute malice, a purpose must be repugnant to the remedy provided by law, a perversion of the legal system such as extortion, delay, or harassment. While a retraction is not a type of remedy available in an action for defamation, *Kramer v. Thompson*, 947 F.2d 666, 680-81 (3d. Cir. 1991) (stating that mandatory retraction may be constitutionally infirm), it is a legitimate way to mitigate damages, *id.*, and it is in no way improper to request a retraction in lieu of compensatory damages in a settlement offer.

However, we conclude that there are genuine issues of material fact as to the first and third forms of malice alleged. Malice is an issue for the jury unless the material facts are undisputed. *See* Restatement (Second) of Torts § 681B(2)(b). DeVaney contends that Thriftway knew its claim was groundless because it possessed documents supporting the truthfulness of DeVaney's statement. In addition, DeVaney has submitted deposition testimony supporting his claim that "one of Thriftway's motives was to stop DeVaney from contacting the Navajo Nation personnel." At the time, the Council was in the midst of some business negotiations with Thriftway, and Thriftway was concerned that DeVaney's contact with Council personnel would interfere with the negotiations. In Thriftway's lawsuit against DeVaney, Thriftway only complained of the speech made in the newspaper article. It has not contended that other contacts with Council personnel would have been tortious. A reasonable juror might infer from such conduct Thriftway's primary

improper motive to silence DeVaney's non-tortious speech or an improper motive in filing suit with knowledge that it lacked probable cause. The district court erred in granting summary judgment on this ground.

VI. CONCLUSION

We believe malicious prosecution and abuse of process should be restated as a single cause of action known as malicious abuse of process. Under this new tort, there must be a misuse of process by the defendant beyond the mere initiation of proceedings against the plaintiff. In addition, a plaintiff must demonstrate that the defendant acted with malice. However, we do not require proof of either a favorable termination or of special damages in order to maintain an action for malicious abuse of process.

DeVaney's claim raises genuine issues of material fact with respect to each element of malicious abuse of process. There are unresolved factual matters regarding the existence of probable cause in Thriftway's filing of its suit against DeVaney. Additionally, there are disputed facts which could demonstrate that Thriftway misused the judicial process, specifically by misusing discovery, a motion for default judgment, and voluntary dismissal. Further, there is a genuine issue of material fact as to whether Thriftway acted primarily for an improper purpose, either because it possessed knowledge that it lacked probable cause or because it acted primarily to silence DeVaney's non-tortious speech. Finally, there are unresolved issues of material fact regarding the damages sustained by DeVaney as a result of Thriftway's suit against

him. Accordingly, we reverse the grant of summary judgment by the district court and the affirmance by the Court of Appeals. We remand this cause for trial on the merits of DeVaney's claim as one of malicious abuse of process.

IT IS SO ORDERED.

/s/ Pamela B. Minzner
PAMELA B. MINZNER, Justice

WE CONCUR.

/s/ Gene E. Franchini
GENE E. FRANCHINI, Chief Justice

/s/ Joseph F. Baca
JOSEPH F. BACA, Justice

/s/ Patricio M. Serna
PATRICIO M. SERNA, Justice

/s/ Dan A. McKinnon, III
DAN A. McKINNON, III, Justice

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

DAVID DEVANEY,

Plaintiff-Appellant,

vs. No. 16,842

THRIFTWAY MARKETING CORP.,
JERRY CLAYTON and R. J. DALLEY,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT
OF SAN JUAN COUNTY
BENJAMIN S. EASTBURN, District Judge

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MEMORANDUM OPINION

(Filed Mar. 25, 1996)

PICKARD, Judge.

Plaintiff appeals from the summary judgment entered against him on his abuse of process and malicious prosecution claims. Our calendar notice proposed summary affirmance. Plaintiff filed a memorandum in opposition to our proposed disposition. Unpersuaded by Plaintiff's arguments, we affirm the decision of the trial

court. In addition, we deny Plaintiff's motion to amend his docketing statement because the issue sought to be raised is otherwise addressed in our opinion and appears to be only a reiteration of facts previously asserted by Plaintiff.

Plaintiff attached a number of exhibits to the memorandum in opposition to the proposed calendar notice. Exhibits neither identified nor tendered as exhibits to the trial court will not be considered on appeal. *See State v. Lucero*, 90 N.M. 342, 345, 563 P.2d 605, 608 (Ct. App.), *cert. denied*, 90 N.M. 636, 567 P.2d 485 (1977). Since attachments A-F of Plaintiff's memorandum do not appear to be a part of the record below, we grant Defendants' motion to strike them. We note that Defendants filed a response to Plaintiff's memorandum in opposition to the calendar notice and a response to Plaintiff's motion to amend the docketing statement on February 29, 1996. The documents are nine days late. The calendar notice was filed on February 7, 1996. SCRA 1986, 12-210(D)(3) (Repl. 1992) (effective Aug. 1, 1992), provides that parties shall have ten days, plus three days mailing time, SCRA 1986, 12-308(B) (Repl. 1992), to file a response to a summary calendar proposal. Thus, any response by Defendants was due no later than February 20, 1996. Moreover, the memorandum responds to the Plaintiff's memorandum in opposition to summary reversal. The rules do not permit such responsive memoranda. *Landavazo v. New Mexico Dep't of Human Serv.*, 106 N.M. 715, 717, 749 P.2d 538, 540 (Ct. App. 1988). Likewise, SCRA 1986, 12-309(D) (Repl. 1992), provides that parties adverse to a motion must file their response within ten days after service of the motion.

We do not consider these documents except to the extent that they contain a motion to strike.

As we stated in the calendar notice, summary judgment is only proper if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Roth v. Thompson*, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992). If, upon consideration of all material facts, a basis is present to decide the issues as a matter of law, summary judgment is proper. *Brown v. Taylor*, 120 N.M. 302, 305, 901 P.2d 720, 723 (1995). The burden of showing the absence of material facts is on the movant, *id.*, and once a prima facie showing is made, the nonmovant must counter with specific facts establishing each required element of the claims. *Blauwkamp v. University of N.M. Hosp.*, 114 N.M. 228, 232, 836 P.2d 1249, 1253 (Ct. App.), *cert. denied*, 114 N.M. 82, 835 P.2d 80 (1992).

a & b: In our calendar notice, we proposed to affirm the trial court's grant of summary judgment on Plaintiff's abuse of process claim on the basis that Plaintiff failed to make a prima facie showing of a claim. Abuse of process requires (1) the existence of an ulterior motive and (2) an act using process other than that process which would be proper in the regular prosecution of the charge. *Westland Dev. Co., Inc. v. Romero*, 117 N.M. 292, 293, 871 P.2d 388, 389 (Ct. App. 1994); *see Richardson v. Rutherford*, 109 N.M. 495, 502, 787 P.2d 414, 421 (1990) (abuse of process requires that defendant's primary motive is to accomplish an illegitimate end and an overt act designed to effect such end). Plaintiff's assertion that *Richardson* abolished the "subsequent act" requirement is an erroneous statement of the law. However, as we previously noted in the calendar notice, *Westland* distinguishes *Richardson* on this

point in that the claim in *Richardson* was not that the complaint was groundless. *Westland Dev. Co.*, 117 N.M. at 294, 871 P.2d at 390. Rather, the parties asserting abuse of process alleged that certain aspects of the complaint were improper, including the excessive amount of damages requested and the inordinate amount of exhibits. *Id.* The Court found that these improper actions could be considered the subsequent acts required to show that the judicial process itself was being abused. *Id. Richardson* simply allowed for the possibility that under certain, very limited and special circumstances the filing of suit could be enough. *Id.*

Assuming, arguendo, that Plaintiff made a prima facie showing that Defendant had an ulterior motive in filing suit sufficient to withstand the summary judgment challenge, we hold that no such showing was made as regards the second requirement. As noted in the calendar notice, examples of what constitutes abuse of process include: excessive execution on a judgment; attachment on property other than that involved in the litigation or in an excessive amount; oppressive conduct in connection with the arrest of a person or the seizure of property; and extortion of excessive sums of money. *Westland Dev. Co.*, 117 N.M. at 293, 871 P.2d at 389. In this case, Plaintiff does not contend that Defendant did anything more than balk at discovery and later dismiss the case. We hold that, as a matter of law, this behavior does not rise to the level of abuse of process.

As in the *Westland* case, the essence of Plaintiff's claim is that Defendant knew or should have known that the allegations in their complaint against Plaintiff were false. *See id.* Such allegations do not establish abuse of

process. *Id.* Although Plaintiff claims that a "ban" on Plaintiff's right to free speech was what Defendant was attempting to accomplish in its lawsuit against Plaintiff, the case before us now is Plaintiff's complaint against Defendant. In that context, the question is whether Plaintiff has made a prima facie case for abuse of process or malicious prosecution or both. One of the cases relied upon by Plaintiff, *Three Lakes Ass'n v. Whiting*, 255 N.W.2d 686 (Mich. Ct. App. 1977), is illustrative of the difference. There, the Association was attempting to prohibit the construction of condominiums. *Id.* Defendant filed suit against it. In holding that the Association had made a prima facie showing of abuse of process, the court found that Defendant had conducted its suit in an oppressive manner in an attempt to cause so much expense and trouble in defending against the suit that the plaintiffs would be forced to give up their attempts. *Id.* at 689. As in this case, the court in *Three Lakes* concluded that the regular and legitimate use of process, even with a bad or malicious intent, is not an abuse of process. *Id.* at 690. The element necessary for abuse is an act in use of process that is not proper in the regular prosecution of a claim, which in essence amounts to extortion. *Id.; see Westland Dev. Co.*, 117 N.M. at 293, 871 P.2d at 389. Thus, a complaint alleging that a defendant brought a groundless lawsuit for malicious motives does not equal abuse of process, *Id.*, and while Plaintiff argues that this is not his contention, he offers little else in support of his claim. Defendant's dilatory compliance with discovery, followed by a dismissal of the prior suit, does not indicate that process was being used for an improper and unlawful purpose. *Cf. Nienstedt v. Wetzel*, 651 P.2d 876, 882 (Ariz.

Ct. App. 1982) (abuse of process held appropriate when process used primarily to subject defendant to excessive legal fees and costs). At most, it indicates possible malicious prosecution.

In his memorandum in opposition, Plaintiff argues that lawsuits may not be used to inhibit protected speech. The cases relied upon by Plaintiff for this proposition are distinguishable from the circumstances and posture of this case. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), a group of white merchants sued to enjoin a boycott of their businesses. *Id.* at 889-90. The Court held that the freedom of assembly could not be so curtailed in the absence of violence or other unlawful activity. *Id.* at 931. Likewise, the court in *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972), held that protestors could not be held liable for damages by a lumber company for seeking to enjoin the cutting of timber. *Id.* at 939. In these two cases, then, the holdings were aimed at prohibiting the use of lawsuits to ban the exercise of first amendment rights.

c: Our calendar notice proposed to affirm the trial court's grant of summary judgment on Plaintiff's malicious prosecution claim because Plaintiff failed to show that he suffered the special damages required for the maintenance of such a claim. As stated in the calendar notice, New Mexico requires an arrest of the person or seizure of the defendant's property before the defendant has a cause of action for malicious prosecution of a civil suit. *Johnson v. Walker-Smith Co.*, 47 N.M. 310, 312, 1[illegible] P.2d 546, 547 (1943) (an action for malicious prosecution will not lie absent arrest of the person or seizure of their property); *Hollars v. Southern Pac. Transp. Co.*, 110 N.M.

103, 108, 792 P.2d 1146, 1151 (Ct. App.), *certs. quashed*, 110 N.M. 14, 791 P.2d 465 (1990).

In his memorandum in opposition, Plaintiff argues that this rule has been modified to extend to other types of damages. We do not agree. The language of *Johnson* and *Hollars* is clear and exclusive, *see Burgett v. Apprill*, 100 N.M. 72, 74, 665 P.2d 1163, 1165 (Ct. App.) (the rule is established that civil malicious prosecution will not lie absent a seizure of the property or the arrest of the person), *cert. denied*, 100 N.M. 192, 668 P.2d 308 (1983), and this Court is bound by the Supreme Court precedent. *See Alexander v. Delgado*, 84 N.M. 717, 718, 507 P.2d 778, 779 (1973) (Supreme Court precedent controls). To that end, the cases from other jurisdictions cited by Plaintiff are unpersuasive. As stated in the calendar notice, although this Court has some discretion to review old or unreaffirmed precedent, *State ex rel. Martinez v. City of Las Vegas*, 118 N.M. 257, 259-60, 880 P.2d 868, 870-71 (Ct. App.), *cert. granted*, 118 N.M. 430, 882 P.2d 21 (1994), we reaffirmed the precedent in *Hollars* and the Supreme Court declined to review the opinion. Consequently, we hold that the rule is still controlling precedent and the grant of summary judgment was proper because Plaintiff showed no evidence of special damages. While we appreciate the seriousness of Plaintiff's alleged inability to find employment as a trading post manager, we believe it to be one of the uncompensated burdens of litigation. *See Hollars*, 110 N.M. at 108, 792 P.2d at 1151 (casting discredit and suspicion on defendant are included in injuries resulting from an ordinary lawsuit).

d: We affirm the trial court's grant of summary judgment on the issue of whether judgment was proper

on the grounds stated in the calendar notice. *See State v. Martinez*, 97 N.M. 585, 586, 642 P.2d 188, 189 (Ct. App.) (an issue is deemed abandoned where a party fails to respond to the calendar notice's proposed disposition of the issue), *cert. quashed*, 98 N.M. 51, 644 P.2d 1040 (1982).

In sum, we affirm the grant of summary judgment in favor of Defendants on both counts of Plaintiff's complaint.

IT IS SO ORDERED.

/s/ Lynn Pickard
LYNN PICKARD, Judge

WE CONCUR:

/s/ Rudy S. Apodaca
RUDY S. APODACA, Chief Judge

/s/ A. Joseph Alarid
A. JOSEPH ALARID, Judge

IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

DAVID DEVANEY,

Plaintiff-Appellant,

vs.

THRIFTWAY MARKETING CORPORATION, JERRY CLAYTON, and R.J. DALLEY,

Defendants-Appellees,

No. 16,842
San Juan County
CV 93-356-1

CALENDAR NOTICE

(Filed Febr. 7, 1996)

You are hereby notified that the:

Record Proper

was filed in the above-entitled cause on **November 13, 1995;**

and the

Supplemental Record

was filed in the above-entitled cause on **January 16, 1996;** and the

Additional Supplemental Record

was filed in the above-entitled cause on **January 26, 1996.** This case has been assigned to the SUMMARY CALENDAR. SUMMARY AFFIRMANCE is proposed.

We note at the outset that Plaintiff failed to number the pages of his docketing statement, contrary to SCRA

1986, 12-305 (B) (Repl. 1992). We instruct counsel to comply with all the rules of appellate procedure in the future. We further note that Plaintiff refers to his memorandum in opposition to summary judgment in the docketing statement. (D.S. 4, 5) Pursuant to SCRA 1986, 1-005(D) (11) (Repl. 1992), memoranda of law and briefs are not filed unless on order of the Court. Thus, the briefs in support of and in opposition to Defendants' motion for summary judgment were not made a part of the record. *See* SCRA 1986, 12-209(C) (Repl. 1992) the record on appeal may be supplemented with inadvertently omitted material). The same is true of the deposition of R.J. Dalley. *See* SCRA 1-005(D) (10). Although it is the duty of Appellant to bring an adequate record before this Court, *see Dillard v. Dillard*, 104 N.M. 763, 765, 727 P.2d 71, 73 (Ct. App. 1986) (appellant has duty of providing an adequate record sufficient to review the issues on appeal); SCRA 12-209(C), the Court, in the interest of judicial economy, requested supplementation of the record from the district court.

Issues: Summary judgment is only proper if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Roth v. Thompson*, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992). If, upon consideration of all material facts, a basis is present to decide the issues as a matter of law, summary judgment is proper. *Brown v. Taylor*, 120 N.M. 302, 305, 901 P.2d 720, 723 (1995). The burden of showing the absence of material facts is on the movant, *Id.*, and once a prima facie showing is made, the nonmovant must counter with specific facts establishing each required element of the claims. *Blauwkamp v. University of New Mexico Hosp.*, 114 N.M.

228, 232, 836 P.2d 1249, 1253 (Ct. App.), *cert. denied*, 114 N.M. 82, 835 P.2d 80 (1992).

a & b: We propose to affirm the trial court's grant of summary judgment on Plaintiff's abuse of process claim. Abuse of process requires (1) the existence of an ulterior motive and (2) an act using process other than that process which would be proper in the regular prosecution of the charge. *Westland Development Co. Inc. v. Romero*, 117 N.M. 292, 293, 871 P.2d 388, 389 (Ct. App. 1994); *see Richardson v. Rutherford*, 109 N.M. 495, 502, 787 P.2d 414, 421 (1990) (abuse of process requires that defendant's primary motive is to accomplish an illegitimate end and an overt act designed to effect such end). Examples of what constitutes abuse of process include: excessive execution on a judgment; attachment on property other than that involved in the litigation or in an excessive amount; oppressive conduct in connection with the arrest of a person or the seizure of property; and extortion of excessive sums of money. *Westland Dev. Co.* at 293, 871 P.2d at 389. The difference between abuse of process and malicious prosecution is that malicious prosecution is concerned with maliciously causing process to issue, while abuse of process is concerned with the improper use of process after it has been issued. *Id.*

In this case, Plaintiff complained that Defendants field the lawsuit without probable cause or reasonable grounds. (R.P. 46) Plaintiff further alleged that Defendants did not comply with discovery, sought a groundless default judgment, and did not appear at a deposition. (R.P. 47) Plaintiff asserts in his docketing statement that there were disputed facts regarding Defendants' motives in filing the suit and that he had propounded discovery

intended to obtain such information but that the trial court ruled on the motion for summary judgment before the discovery was due. (D.S. 3)

First, we note that Defendants' filed a motion for summary judgment in November, 1993, (R.P. 14), which was denied. (R.P. 32) In the order denying the motion, the court stated that "Defendant may renew its motion at the conclusion of discovery." (*Id.*) More than a year after the motion for summary judgment was filed, on April 7, 1995, Plaintiff filed a Certificate of Readiness, certifying to his readiness for trial. (R.P. 42) Approximately two months after Plaintiff filed the certificate, Defendants filed their motion for summary judgment, (R.P. 54), which was granted. (R.P. 80) We propose to hold that Plaintiff may not now complain on appeal that the motion for summary judgment was premature when he had already represented to the trial court his readiness for trial and had more than a year to complete discovery. *See Sun Country Savings Bank of N.M. v. McDowell*, 108 N.M. 528, 535, 775 P.2d 730, 737 (1989) (summary judgment proper when nonmovant had two and a half months to complete critical discovery but failed to do so); *but see Baker v. Bhajan*, 117 N.M. 278, 283, 871 P.2d 374, 379 (1994) (summary judgment should not be granted before a party completes discovery); *National Excess Ins. Co. v. Bingham*, 106 N.M. 325, 328, 742 P.2d 537, 540 (Ct. App. 1987) (summary judgment is not appropriate when the facts before the court are insufficiently developed or where further factual resolution is essential for determination of the central legal issues involved).

Second, we propose to hold that, as a matter of law, Plaintiff failed to show an abuse of process. Plaintiff relies

on *Richardson* for the proposition that the filing of the lawsuit is enough to establish an abuse of process claim. However, *Westland Dev. Co.* distinguishes *Richardson* on this point in that the claim in *Richardson* was not that the complaint was groundless. *Westland Dev. Co.*, 117 N.M. at 294, 873 P.2d at 390. Rather, the parties asserting abuse of process alleged that certain aspects of the complaint were improper, including the excessive amount of damages requested and the inordinate amount of exhibits. *Id.* The Court found that these improper actions could be considered the subsequent acts required to show that the judicial process itself was being abused. *Id.* In this case, it appears that Plaintiff's claim is based solely on the allegedly groundless filing of the suit. (D.S. 4)

Third, we propose to hold that Plaintiff failed to show there was a dispute as to whether Defendants had an ulterior, illegitimate motive for filing the lawsuit. Plaintiff claims that Defendants filed the lawsuit to obtain a retraction of the statements made by Plaintiff in the article and to deter him from meeting with Navajo Nation officials. (D.S. 3) Since Defendants sued Plaintiff for libel and interference with tortious relations, seeking a retraction of the allegedly libelous statements and wishing to deter continued interference with contractual relations appears neither ulterior nor illegitimate. *See, e.g., Westland Dev. Co.*, 117 N.M. at 293, 871 P.2d at 389 (examples of what may constitute abuse of process). Moreover, it appears from the record that Plaintiff attempted to use Defendants' proposals of settlement as his only specific evidence of ulterior motive. (S.R.P. 149, 223 referencing 158-59; S.P.R. 40 [Plaintiff's deposition]) Settlement offers are not admissible to show liability. SCRA 1986, 11-408

(Repl. 1994) (evidence of compromise offer inadmissible to show liability). Finally, Plaintiff fails to specifically state what material dispute of facts exists, (D.S. 3), aside from his own bare arguments and opinions, (S.R.P. 219-23), which we propose to hold are inadequate to defeat Defendants' prima facie showing of entitlement to summary judgment. *See Blauwkamp*, 114 N.M. at 232, 836 P.2d at 1253; *Cf. Diaz v. Feil*, 118 N.M. 385, 388, 881 P.2d 745, 748 (Ct. App. 1994) (a bare denial of proximate causation is an insufficient basis upon which to grant summary judgment).

c: We propose to affirm the trial court's grant of summary judgment on Plaintiff's malicious prosecution claim because Plaintiff failed to show that he suffered the special damages required for the maintenance of such a claim. New Mexico requires an arrest of the person or seizure of the defendant's property before the defendant has a cause of action for malicious prosecution of a civil suit. *Hollars v. Southern Pacific Transp. Co.*, 11 N.M. 103, 108, 792 P.2d 1146, 1151 (Ct. App.), *cert. quashed*, 110 N.M. 14, 791 P.2d 465 (1990). Although Plaintiff argued in his brief in opposition to the motion for summary judgment that the foregoing rule should be modified to remove the special injury requirement, both the district court and this Court are bound by Supreme Court precedent. *See Alexander v. Delgado*, 84 N.M. 717, 718, 507 P.2d 778, 779 (1973) (Supreme Court precedent controls); *Johnson v. Walker-Smith Co.*, 47 N.M. 310, 312, 142 P. 2d 546, 547 (1943) (an action for malicious prosecution will not lie absent arrest of the person or seizure of their property). Although this Court has some discretion to review old or unreaffirmed precedent, *State of New Mexico ex rel. Martinez v. City of*

Las Vegas, 118 N.M. 257, 259-60, 880 P.2d 868, 870-71 (Ct. App. 1994), we reaffirmed the precedent in *Hollar* and the Supreme Court declined to review the opinion. Consequently, we propose to hold that the rule is still controlling precedent and the grant of summary judgment was proper because Plaintiff showed no evidence of special damages. It appears that the damages allegedly suffered by Plaintiff, his inability to find employment as a trading post manager, are the uncompensated burdens of litigation. *See Hollar*, 110 N.M. at 108, 792 P.2d at 1151 (casting discredit and suspicion on defendant are included in injuries resulting from an ordinary lawsuit).

d: We propose to affirm the trial court's grant of summary judgment on the issue of whether judgment was proper in light of Plaintiff's claim that discovery was incomplete for the same reasons as those stated in the discussion of Issues a and b. Plaintiff announced to the trial court that it was ready for trial, and had more than two years since the commencement of the suit to complete discovery. *See Sun Country Savings Bank of N.M.*, 108 N.M. at 534, 775 P.2d at 736.

In sum, we propose to affirm the grant of summary judgment in favor of Defendants on both counts of Plaintiff's complaint.

/s/ Lynn Pickard
Judge

ELEVENTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SAN JUAN

DAVID DEVANEY,

Plaintiff,

vs. No. CV-93-356-3

THRIFTWAY MARKETING CORP.,
JERRY CLAYTON, and R.J. DALLEY,

Defendants.

SUMMARY JUDGMENT

THIS MATTER having come before the Court of Defendants' Motion for Summary Judgment, the Court having reviewed the briefs, pleadings, depositions, affidavits, answers to interrogatories and admissions on file, and finding there to be no genuine issue as to any material fact;

THE COURT FINDS and concludes from the uncontroverted facts and evidentiary matters here present that, as a matter of law:

1. Defendants possessed reasonable and probable cause to initiate and prosecute the prior lawsuit captioned *Thriftway Marketing Corp. v. Dave DeVaney*, No. CV 91-584-3; and

2. Defendants possessed no ulterior motive or improper purpose in instituting or prosecting [sic] that action.

IT IS THEREFORE ORDERED AND ADJUDGED that Defendants be and are hereby granted judgment in

their favor and Plaintiff's claims asserted herein be and are hereby dismissed.

/s/ Byron Caton
BYRON CATON
DISTRICT JUDGE

Submitted by:

/s/ Robert D. Benson
Robert D. Benson
Attorney for Defendants

Approved by:

Telephonically Approved 8-30-95
Earl Mettler
Attorney for Plaintiff

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9/6/95

Supreme Court, U.S.
FILED
APR 22 1998
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No. 97-1564

In The

Supreme Court of the United States

October Term, 1997

THRIFTWAY MARKETING CORP.,
JERRY CLAYTON, and R.J. DALLEY,

Petitioners,

vs.

DAVID DEVANEY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

RESPONDENT'S BRIEF IN OPPOSITION

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5 pp

REASONS FOR DENYING THE PETITION

Petitioners' first two arguments are both based upon misreading the New Mexico Supreme Court decision. In each instance, Petitioners misread the decision, then speculate about possible consequences of the decision as they read it, and then attempt to cast these hypothetical consequences as constitutional violations. The Petition does not present any reasons of the character normally considered in granting certiorari, and does not raise any important question of federal law. Indeed, Petitioners ask the Court to interfere in an area of law traditionally reserved to the states.

Petitioners' first argument is that consideration of whether adequate pre-filing investigation was done by a malicious abuse of process defendant will lead to an "intrusion upon the attorney-client relationship and the attorney's work product constitut[ing] a denial of the right to counsel." Petition, 7. Petitioners' basis for this contention is their belief that the decision below mandates broad inquiry into what the opposing attorney or litigant subjectively believed at the relevant time, based upon Footnote 2 in the Opinion. In fact, the language from Footnote 2 which Petitioners quote is not the standard the court below set, but one it distinguished. The quoted standard is the standard under the New Mexico counterpart to Rule 11 of the Federal Rules of Civil Procedure. Petition Appendix, 17 n. 2. The court below explained that the malicious abuse of process standard is *objective* reasonableness, while a subjective standard is applied under New Mexico's Rule 11.

Some inquiry into the reasonble pre-filing knowledge and belief of a litigant has always been a part of the tort of wrongful institution of legal proceedings. This includes inquiry into whether the litigant consulted with legal counsel and what information was provided to counsel. Restatement (Second) of Torts § 675, Comments *f*, *g* and *h*, pp. 460-461 (1977). Such inquiry does not unduly interfere with attorney-client privilege or the work product doctrine.

Likewise, this Court has held that a party's reasonable expectation of success and subjective motive for filing are relevant to whether its filing was "sham" litigation under antitrust law, and inquiry into those factors does not deny the right to counsel. *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993).

Finally, the objective standard involving consideration of whether there was reasonable pre-filing investigation, adopted by the court below, is similar to the standard of the federal Rule 11. Inquiry into pre-filing investigation need not interfere with attorney-client privilege or protection of work product, as is shown by the experience under that Rule.

Petitioners' second argument is that requiring them to show a reasonable pre-filing investigation of the law as a defense to a malicious abuse of process claim denies their right to equal protection, because the same would not be required of a litigant who had not been represented by counsel. Petitioners again misread the decision below. Nothing in the Opinion supports their assumption that a litigant who had filed *pro se* and was later sued for

malicious abuse of process would somehow be excused from showing a reasonable pre-filing investigation of the law. Again by analogy to Rule 11, the requirements of reasonable inquiry and good grounds logically apply to both an attorney and a party acting *pro se*. *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533 (1991).[1] Thus, the classification to which Petitioners object on equal protection grounds does not exist.

In their third argument, Petitioners contend that this Court "established" a standard for probable cause for filing a lawsuit that is different from the standard set by the court below, citing *Professional Real Estate Investors, supra*. That case, however, did not establish a standard for state law torts such as malicious abuse of process. That case concerned the "sham" litigation doctrine of antitrust law. State tort law was cited for purposes of analogy and comparison.[2] *Professional Real Estate Investors* did not discuss or adopt "every substantive nuance and procedural quirk of the common-law tort of wrongful civil proceedings" for transplantation into federal antitrust law. 508 U.S., 67 (Souter, J., *concurring*).

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[1] Indeed, the court below cited *Business Guides* and federal Rule 11, and distinguished the subjective standard it applies under New Mexico's counterpart to Rule 11. Petition Appendix, 17.

[2] The decision below does not differ substantially from the body of state tort law cited in *Professional Real Estate Investors*. The decision below cited *Professional Real Estate Investors*, and both that case and the decision below cited the Restatement (Second) of Torts, § 675. 508 U.S. 62-63; Petition Appendix, 17.

Further, setting federal standards for the tort of malicious prosecution would encroach improperly upon state law causes of action. *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 551-552 (1991). State tort law reflects state policies regarding fee shifting and standards for compensation of parties who are victimized by litigation, and such matters are reserved to the states. *Id.*, 553; *Id.*, 567 (Kennedy, J., *dissenting*). Petitioners' request that the Court grant certiorari to modify the decision below seeks just such an encroachment upon matters reserved to the states.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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